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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-6848

JOHN LEE BOWEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 74-118) is reported at 500 F. 2d 960.

JURISDICTION

The *en banc* judgment of the court of appeals was entered on May 9, 1974. The petition for a writ of certiorari was filed on June 7, 1974, and was granted on October 15, 1974 (A. 119). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether this Court's decision in *Almeida-Sanchez* v. *United States*, 413 U.S. 266—which held that a warrantless "roving patrol" search of an automobile

for concealed aliens, conducted by Border Patrol officers acting without probable cause to believe that the vehicle contained any aliens, violated the Fourth Amendment's proscription against unreasonable searches and seizures—should be extended to invalidate a similar search for aliens at a fixed Border Patrol checkpoint.

2. Whether, if *Almeida-Sanchez* should be so extended, the extension should apply to the search in this case, which took place prior to the decision in *Almeida-Sanchez.*

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of having smuggled 356 pounds of marihuana into the United States from Mexico (count 1), having received, concealed, and facilitated the transportation of the marihuana knowing it to have been illegally imported (count 2), and having illegally possessed 158 benzedrine tablets (count 3), in violation of 21 U.S.C. (1964 ed.) 176(a) and 331 (q)(3)(B) (A. 23–24, 57–59). He was sentenced to concurrent terms of seven years' imprisonment on counts 1 and 2 and to five years' probation on count 3 (A. 58–59).

On June 16, 1972, the court of appeals affirmed petitioner's conviction *per curiam* in an opinion reported at 462 F. 2d 347 (A. 69–70). This Court thereafter vacated the judgment of the court of appeals and remanded the case for further consideration in light of *Almeida-Sanchez* v. *United States,* 413 U.S.

266 (A. 71; 413 U.S. 915). On remand, the court of appeals again affirmed petitioner's conviction (A. 74–118).

1. On January 19, 1971, Border Patrol Agent Frank Ortmeier was on duty checking northbound traffic at a fixed immigration checkpoint on California State Highway 86, near the junction of that highway and State Highway 78, in Imperial County, California (A. 34).[1] At about 10:05 p.m. on that date,

[1] The checkpoint in question was described in *United States* v. *Baca*, 368 F. Supp. 398, 413 (S.D. Cal.), as follows:

"The Border Patrol has established a checkpoint on Route 86 west of the Salton Sea National Wildlife Refuge just north of the intersection of State Route 78. This location is approximately 36 air miles and 49 road miles from the Mexican border. The checkpoint is bordered on the east by farm land extending for about three miles to the Salton Sea. To the west and south of this checkpoint lies desert.

"At this location the Border Patrol has a building and traffic check signs together with blinker lights. A power source is located at the facility. The signs are of the usual type and the floodlights at night cause the area to be very well lit. As can be seen from photographs introduced by the government, the area is desolate country with virtually no inhabitants between the checkpoint and the border.

"The Border Patrol attempts to keep this checkpoint operating on a 24-hour basis and in fiscal 1973 they operated around 6,000 hours which is approximately 65 to 70 percent of the time.

"At this checkpoint the checking operations are of the usual type with about 75 percent of the vehicles traveling through it being stopped for inquiry with around 10 percent to 15 percent of all vehicles being detained for further inspection. It is estimated that over half of the vehicles at this checkpoint have come directly from Mexicali or have occupants who walked across the border at Calexico.

"During the first ten months of calendar year 1973 ap-

petitioner approached the checkpoint driving a pick-up truck with a "camper" on the bed, and he was stopped for a routine immigration inspection (A. 34–35). After petitioner identified himself as a United States citizen, Agent Ortmeier asked him "to open up the back of the camper for a search for illegal aliens" (A. 36).

Petitioner complied with the request, and as soon as the camper was opened Agent Ortmeier, who was familiar with the odor of marihuana (A. 42–43), "noticed a strong odor of marihuana coming from the back of the camper" (A. 36, 41). Agent Ortmeier entered the camper and, using a flashlight, observed what "appeared to be bedrolls or someone laying upon the mattress" in the forward portion of the camper that extended up and over the top of the truck cab (A. 36). As he approached the mattress, he discovered that the objects on the bed were two "backpacks," and at the same time he observed in plain view what appeared to be "kilo bricks" of marihuana in cellophane-wrapped packages underneath the mattress (A. 36). Upon examining the contents of one of the packages, Agent Ortmeier concluded that the substance therein was marihuana (A. 36–37). He then placed petitioner under arrest (A. 37).

A subsequent search of the camper revealed additional marihuana concealed in a cupboard and under-

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proximately 690 deportable aliens were apprehended at this checkpoint according to the detailed traffic logs maintained by the Border Patrol.

"This checkpoint is located on a point with one of the lowest volumes of traffic along Route 86 north of the population centers of Calexico, Brawley and El Centro."

neath seats in the camper (A. 37). The benzedrine tablets were found in the pocket of a jacket in the truck's passenger compartment (A. 37, 52–53).

Agent Ortmeier testified that there was nothing unusual about petitioner or his vehicle that raised any particular suspicion that the vehicle contained aliens illegally present in this country (A. 40–41). On the date in question, the volume of traffic at the checkpoint was light, and every car coming through the checkpoint was being stopped, except for vehicles containing persons whom the agents knew and who regularly traveled through the checkpoint (A. 34–35, 39, 40).

Petitioner's pretrial motion to suppress the evidence derived from the search of his camper was denied by the district court following a hearing (Tr. 48–49).[2]

2. The court of appeals affirmed, holding that "[t]he search and seizure were plainly lawful" (A. 70; 462 F. 2d at 348). A petition for a writ of certiorari was filed by petitioner and was held by this Court pending its decision in *Almeida-Sanchez*. The Court ultimately ruled in that case that a warrantless "roving patrol" search of an automobile for concealed aliens, conducted by Border Patrol officers acting without probable cause or reasonable suspicion to believe that the vehicle contained aliens present in this country unlawfully, violated the Fourth Amendment's prohibition against unreasonable searches and seizures. The Court thereafter vacated the judgment of the court

[2] "Tr." refers to the transcript of the proceedings in the district court, which is part of the record in this case.

of appeals in the present case and remanded the case for further consideration in light of *Almeida-Sanchez* (A. 71; 413 U.S. 915).

3. On remand, the court of appeals, sitting *en banc*, again affirmed petitioner's conviction, setting forth its reasons in a lengthy two-part opinion (A. 74–118). In Part I, the court held by a 7–6 vote (1) that "*Almeida-Sanchez* is as applicable to fixed-checkpoint searches as to roving-patrol searches" (A. 85) and that evidence seized in a warrantless, non-probable-cause, checkpoint search of an automobile for aliens must be suppressed under the principles of *Almeida-Sanchez* unless the search can be said to be the "functional equivalent" of a border search; and (2) that "the search is a functional equivalent of a border search" only if it "takes place at a location where virtually everyone searched has just come from the other side of the border" (A. 81) or if it can be said with "reasonable certainty" either that the contents of the vehicle were aboard when the vehicle crossed the border or, if the vehicle has not itself crossed the border, that the persons or things in it recently entered or were brought into this country illegally (A. 81–83). The court concluded that "the record in this case clearly indicates that the search conducted was not the functional equivalent of a border search" (A. 84).

In Part II of the opinion, however, the court held that the principles of *Almeida-Sanchez*, as applied to searches at fixed checkpoints, created a new constitutional rule that should not be applied retroactively to searches that occurred prior to June 21, 1973, the

date of this Court's decision (A. 100–110). Since the search in the present case occurred prior to June 21, 1973, the court held that petitioner's motion to suppress was correctly denied (A. 110).[3]

SUMMARY OF ARGUMENT

1. The court of appeals held that, like the warrantless roving patrol search in *Almeida-Sanchez,* a routine, warrantless search of a vehicle for aliens at a fixed Border Patrol checkpoint is unreasonable under the Fourth Amendment unless the checkpoint is at the functional equivalent of the border. It upheld petitioner's conviction, however, because the search in this case took place prior to this Court's decision in *Almeida-Sanchez.* Petitioner's brief in this Court addresses only the retroactivity question.

We submit, however, as an alternative ground for affirmance, that the checkpoint search was reasonable notwithstanding the absence of a warrant. Relying upon the discussion of this issue in our brief in *United States* v. *Ortiz,* No. 73–2050, we argue that checkpoint operations stand on a different legal footing from roving patrol operations and that a warrant would not materially contribute to the reasonableness of the

[3] The majority opinion in Part II represented the views of seven judges. Four other judges concurred in the holding that the new rule should apply only to searches conducted after the date of the decision in *Almeida-Sanchez*, but they would have ruled that petitioner himself, "as the moving party in the case in which this new rule has been announced, * * * is fully entitled to its protection" (A. 111). Two judges dissented on the ground that *Almeida-Sanchez* created no new rule for retroactivity purposes (A. 111–118).

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former even if it can be said to enhance the reasonableness of the latter.

2. If the Court disagrees with that argument and upholds the court of appeals' ruling that warrantless checkpoint searches are *per se* unreasonable, then we agree with petitioner that he should be given the benefit of that ruling. He was the moving party in the case in which the Ninth Circuit first held, overruling a long line of its prior decisions, that warrantless checkpoint searches are unlawful. Since the decision in petitioner's case, as we argue in *Ortiz,* announced a new rule in the Ninth Circuit, the decision-making policy ordinarily followed by this Court in criminal cases suggests that petitioner should be accorded the status of a chance beneficiary of that new rule. *Stovall* v. *Denno,* 388 U.S. 293, 301.

3. Petitioner would not be entitled to that special status, however, if this Court were to conclude, as the court of appeals apparently did, that it was this Court's decision in *Almeida-Sanchez,* rather than the court of appeals' decision in the present case, that announced the new rule in the Ninth Circuit with respect to the validity of warrantless checkpoint searches.[4] On

[4] It is clear, we submit, that there has been, since the initial affirmance of petitioner's conviction, a total transformation of the prevailing law on the checkpoint issue in the Ninth Circuit. If the change was not accomplished by that court's decision in the present case, as we believe, then it must have been implicit in this Court's decision in *Almeida-Sanchez*, though the search in that case was conducted by a roving patrol.

that assumption, *Almeida-Sanchez*, as a new application of the exclusionary rule, would be applicable only to searches conducted after the date of the decision in that case.

Applying *Almeida-Sanchez* to searches conducted before the decision was announced would not further the principal purpose of the exclusionary rule, which is to deter *future* unlawful police conduct. It would punish the Border Patrol and the public for law enforcement conduct carried on in good faith reliance upon the prevailing law at the time.

Nor, in those circumstances, should the principles of *Almeida-Sanchez* be applied retroactively to cases like this one simply because such cases were pending on direct review at the time *Almeida-Sanchez* was decided. Since the decision in *Stovall* v. *Denno, supra,* this Court has consistently declined to distinguish for retroactivity purposes between cases in which the conviction was final at the time a new rule was announced and cases that were at various stages of trial and direct review. Since the exclusionary rule is designed to deter police misconduct, it is the date upon which the law enforcement conduct took place, not the date on which the conviction became final, that should govern the application of a new Fourth Amendment ruling.

ARGUMENT

I

THE LIMITED SEARCH OF PETITIONER'S VEHICLE FOR ALIENS, CONDUCTED AT A FIXED IMMIGRATION TRAFFIC CHECKPOINT, WAS REASONABLE UNDER THE FOURTH AMENDMENT NOTWITHSTANDING THE ABSENCE OF A WARRANT AND OF PARTICULARIZED PROBABLE CAUSE

Petitioner's retroactivity contentions in this case presuppose the correctness of the Ninth Circuit's holding in Part I of its opinion that a routine stop and search of a vehicle for aliens at a fixed Border Patrol checkpoint is unlawful in the absence of a warrant unless the checkpoint can be said to be the functional equivalent of the border. We submit, however, that a limited warrantless search of a vehicle for concealed aliens, conducted at a fixed inland checkpoint, is not *per se* unreasonable under the Fourth Amendment, even if it is not the functional equivalent of a border search. Unlike the warrantless roving patrol search invalidated by this Court in *Almeida-Sanchez,* a limited checkpoint search of a vehicle for aliens does not depend for its reasonableness upon advance judicial approval, through the warrant procedure, of the checkpoint's operation.

Our argument on this issue is set forth in our brief in *United States* v. *Ortiz,* No. 73–2050, pp. 15–43, and we do not repeat it here.[5] As we show in our brief in

[5] *Ortiz* involves a checkpoint search that took place *after* the decision in *Almeida-Sanchez.* The court of appeals reversed the conviction on the authority of its *en banc* decision in the present case.

that case, there exists an area-wide equivalent of probable cause for the limited vehicle searches conducted at fixed Border Patrol checkpoints in the area of the Mexican border, where the concentration of illegally present aliens is high and where inland traffic checkpoints are essential to the effective enforcement of the Nation's immigration laws. Moreover, as we also show in our brief in *Ortiz,* advance judicial approval for the operation of a checkpoint would not materially enhance the reasonableness of the limited searches conducted at the checkpoint. The significant differences between checkpoint and roving patrol operations serve to distinguish the present case and *Ortiz* from *Almeida-Sanchez.*

If the Court agrees with our argument on the checkpoint issue in *Ortiz,* that would provide an alternative ground for affirmance of the judgment of the court of appeals in the present case.[6] If, as we submit, the Border Patrol officers acted lawfully in stopping petitioner's vehicle at the checkpoint and inspecting the camper for the presence of concealed illegal

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[6] The issue is properly before the Court in this case even though the government did not file a cross-petition for a writ of certiorari. It is settled that "[t]he prevailing party may * * * assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court" (*Dandridge* v. *Williams,* 397 U.S. 471, 475, n. 6). See also Stern, *When to Cross-Appeal or Cross-Petition—Certainty or Confusion?,* 87 Harv. L. Rev. 763 (1974). We do not seek, and our argument would not logically compel, any modification of the court of appeals' judgment in this case affirming petitioner's conviction.

aliens,[7] then the seizure of the marihuana discovered in the course of that inspection, and the seizure of the benzedrine tablets discovered in a subsequent search incident to petitioner's arrest, were lawful, and petitioner's motion to suppress was for that reason correctly denied by the district court.

When Agent Ortmeier, in the course of his inspection of the camper for illegal aliens, detected the odor of marihuana and observed in plain view the brick-shaped, cellophane-wrapped packages under the mattress in the camper, he had probable cause to believe that the packages contained marihuana, and he was justified in inspecting their contents. See, *e.g.*, *United States* v. *Blackstock*, 451 F. 2d 908, 910 (C.A. 9). The

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[7] Although the search in the present case was conducted at a different checkpoint from the one involved in *Ortiz*, that difference should not lead to a different result in this case. Like the San Clemente checkpoint, the Route 86 checkpoint at which petitioner's vehicle was stopped is an integral and effective part of the network of checkpoints in the Southern California area and is located and operated in a manner reasonably designed to minimize disruption of and inconvenience to the innocent traveling public. The district court in *United States* v. *Baca*, *supra*, which found that both checkpoints were the functional equivalents of the border, stated (368 F. Supp. at 417):

"The checkpoint on Route 86 is situated at a point with one of the lowest volumes of traffic on that highway, thus tending to cause little intrusion and inconvenience to travelers, as well as scarcely impeding the goal of safe driving. This checkpoint is not easy to intentionally circumvent without being steered into another checkpoint on another highway, in that it is bordered by the Salton Sea on one side and desert on the other. It lies just 36 air miles from the Mexican border and it has been estimated that over half of the vehicles reaching this checkpoint have come directly from Mexicali, B.C., Mexico."

agent's arrest of petitioner and seizure of the marihuana, the subsequent search of the vehicle incident to the arrest (see *Adams* v. *Williams*, 407 U.S. 143, 149), and the seizure of the additional marihuana and benzedrine tablets were therefore valid under the Fourth Amendment.

II

IF THE COURT DISAGREES WITH OUR CONTENTIONS ON THE CHECKPOINT ISSUE BUT DETERMINES THAT THE DECISION OF THE COURT OF APPEALS IN THIS CASE WAS A DEPARTURE FROM PRIOR LAW IN THE NINTH CIRCUIT, THEN PETITIONER SHOULD, AS A MATTER OF SOUND DECISION-MAKING POLICY, BE AFFORDED THE BENEFITS OF THE NEW RULE ESTABLISHED IN HIS CASE

If this Court disagrees with our contentions in point I of this brief and upholds the court of appeals' conclusion that a routine warrantless checkpoint search is *per se* unreasonable, then it must reach petitioner's contention that he should be afforded the benefits of the rule even though the search of his vehicle took place more than two years prior to this Court's decision in *Almeida-Sanchez*.

As we understand petitioner's brief, he contends, first, that no retroactivity issue is even presented, because both *Almeida-Sanchez* and the court of appeals' decision in the present case merely reaffirmed long-standing constitutional principles never deviated from by this Court (Br. 6–12), and both decisions were clearly foreshadowed by this Court's prior decisions (Br. 18–20). Second, petitioner argues that if, for purposes of retroactivity analysis, *Almeida-Sanchez* is

viewed as a new application of the Fourth Amendment exclusionary rule, he should not be deprived of the benefits of that rule, even though the search of his vehicle was conducted prior to this Court's decision in that case. Petitioner reasons that the criteria applied in this Court's prior retroactivity decisions support a retrospective application of the principles of *Almeida-Sanchez* (Br. 20–26) and, in any event, that the decision should at least be applied to all cases in which the defendant had raised and preserved the issue and which were pending on direct review at the time of the decision (Br. 15–18, 25 n. 10). Petitioner's third argument is that if the Ninth Circuit's decision in the present case is viewed as establishing a new rule for that circuit with respect to warrantless checkpoint searches, then petitioner, as the moving party in the case that established the new rule, should be entitled to its benefits (Br. 13–14).

We argue in our brief in *Ortiz*, pp. 44–55, that the Ninth Circuit's decision in Part I of the present case, which overruled a long line of prior Ninth Circuit decisions upholding the validity of warrantless checkpoint searches, was a new application of the Fourth Amendment exclusionary rule in that circuit and should be applied prospectively only. If this Court agrees with that contention, then we concur in petitioner's view that he should be given the benefit of the new rule established at his instance by the court of appeals.

We do not agree, however, with petitioner's assertion that a purely prospective ruling by the court of

appeals would be "in direct violation of the 'case or controversy' requirement of Article III, Section 2" (Br. 13). This Court stated in *Linkletter* v. *Walker*, 381 U.S. 618, that "the Constitution neither prohibits nor requires retrospective effect" for new constitutional rules (381 U.S. at 629); "there seems to be no impediment—constitutional or philosophical—" to giving a decision purely prospective effect (*id.* at 628). See also *Johnson* v. *New Jersey*, 384 U.S. 719, 733. Indeed, this Court has done precisely that when the circumstances have made it appropriate to apply the decision only to future cases. See *James* v. *United States*, 366 U.S. 213, 221–222 (opinion of Warren, C. J.); *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 422–423; *Allen* v. *State Board of Elections*, 393 U.S. 544, 572.

Although the Constitution does not require that petitioner be given the benefits of the new rule established in his case, this Court generally follows the practice in criminal cases of applying a new constitutional ruling to the litigant in whose case it was announced. "Sound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies, and in the possible effect upon the incentive of counsel to advance contentions requiring a change in the law, militate against denying [litigants] the benefits of * * * decisions" announcing new rules (*Stovall* v. *Denno*, 388 U.S. 293, 301; footnotes omitted). The same policy should ordinarily be followed by the courts of appeals. See, *e.g.*, *Gaither* v. *United States*, 413 F. 2d 1061, 1085 (C.A.D.C.).

III

IF THE COURT DETERMINES THAT THE DECISION OF THE COURT OF APPEALS IN THIS CASE WAS NOT A NEW APPLICATION OF THE EXCLUSIONARY RULE, THEN PETITIONER'S CONVICTION SHOULD NOT BE DISTURBED, SINCE THE SEARCH IN HIS CASE WAS CONDUCTED PRIOR TO THE DECISION IN *ALMEIDA-SANCHEZ*

Our agreement with petitioner is limited to his third contention, which presupposes that the decision of the court of appeals in this case "was a clear break with the past" (*Desist* v. *United States*, 394 U.S. 244, 248) in the Ninth Circuit. But if the Court concludes, contrary to that presupposition and contrary to our submission in *Ortiz*, that the decision in this case did not announce a new application of the exclusionary rule in the Ninth Circuit, then petitioner would lose his special status as a "chance beneficiar[y]" (*Stovall* v. *Denno*, *supra*, 388 U.S. at 301), a status that is afforded only to the moving party in a decision announcing a new rule. The Court would then have to consider petitioner's other contentions: (1) that even the decision in *Almeida-Sanchez* announced no new rule and therefore presents no issue of retroactivity, and (2) that even if it does present such an issue, its principles should be applied retroactively, at least to litigants who had preserved the issue and whose convictions had not yet become final when *Almeida-Sanchez* was decided.

1. With respect to the threshold question whether *Almeida-Sanchez* presents a choice between retroactivity or non-retroactivity, we show in our brief in

United States v. *Peltier*, No. 73–2000, pp. 14–27, that, as applied to roving patrol searches, *Almeida-Sanchez* was a new application of the exclusionary rule that presents a retroactivity issue. The decision was a sharp break with prior law in the courts of appeals, and it disrupted an immigration law enforcement practice long accepted and widely relied upon by the Border Patrol in the Mexican border area.

It is obvious that there has also been a change in the prior law concerning the validity of warrantless *checkpoint* searches. The opinion of the Ninth Circuit panel that initially affirmed petitioner's conviction accurately reflected the prevailing law in the circuit prior to this Court's decision in *Almeida-Sanchez*. The opinion stated simply that "[t]he search and seizure were plainly lawful" (A. 70). While there may be reasonable dispute as to when the change in law occurred, it is clear that there has been a complete turnabout in the Ninth Circuit's views on the legality of warrantless checkpoint searches.

We contend in *Ortiz* (Br. 46–55) that it was the decision of the court of appeals in the present case, rather than the decision of this Court in *Almeida-Sanchez*, that changed the Ninth Circuit law with respect to checkpoint searches. But if the Court disagrees with that contention, then we submit, for the reasons stated in our brief in *Peltier*, that *Almeida-Sanchez* itself provided the requisite "clear break with the past" (*Desist* v. *United States*, *supra*, 394 U.S. at 248) insofar as the validity of warrantless checkpoint searches is concerned. As the majority of

the court of appeals in the present case held, *"Almeida-Sanchez,* as applied to searches at fixed checkpoints, overrules clear past precedent, both statutory and case law," and invalidates "[a] law enforcement practice authorized by our court for * * * an extensive period" (A. 103).[8] The decision therefore "measures up as a new pronouncement" (*ibid.*).

All but two of the judges in the court of appeals agreed that *Almeida-Sanchez,* as applied to checkpoint searches, was a new application of the exclusionary rule (see note 3, *supra*). Judge Hufstedler's dissenting opinion—echoed in petitioner's brief (p. 7)—stated that, in "deciding whether retroactivity is in issue, * * * the only 'old' and 'new' law that is relevant is the constitutional law enunciated by the Supreme Court" (A. 116). This Court has already held, however, that a decision of the Supreme Court on an issue of first impression may raise a retroactivity issue if it overrules a line of court of appeals decisions. *Chevron Oil Co.* v. *Huson,* 404 U.S. 97. See our briefs in *Ortiz* (pp. 52–55) and *Peltier* (pp. 25–27).

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[8] The court of appeals stated (A. 102–103):

"Prior to *Almeida-Sanchez*, there was no indication from any of the courts of appeals that searches at fixed checkpoints were unconstitutional. Rather, the indication was that such searches were constitutional, for 35 of 36 judges who had considered the question in the three circuits involved in enforcing the immigration laws along our Mexican border had upheld immigration stops and searches. * * * For over a decade we have consistently and repeatedly upheld convictions based upon evidence seized during searches made at fixed checkpoints * * *."

The proper inquiry is not necessarily whether a prior decision of this Court was overruled but whether law enforcement officers were acting in good faith reliance upon "a different understanding of the controlling judge-made law from the rule that ultimately prevailed" (*Lemon* v. *Kurtzman*, 411 U.S. 192, 198, plurality opinion). If so, it should not matter for purposes of retroactivity analysis whether the "controlling" law had been enunciated by this Court or a court of appeals. In either event, the eventual overruling of the prior law is a sufficient break with the past to raise a retroactivity question. As the majority of the court of appeals stated (A. 101–102):

> Only a small number of the appealed federal cases are ever reviewed by the Supreme Court. As a matter of necessity, the Court must leave day-to-day application of the law to the lower courts. Therefore, law enforcement procedures must be based to a great extent upon circuit court decisions. Because of this necessity, a law enforcement practice may develop and be sanctioned by court approval for many years before it is reviewed by the Supreme Court. Where such a rule is ultimately reversed by the Court, the pronouncement is "new" simply by virtue of the fact that the people who apply the law on a day-to-day basis have not previously understood the new statement to be the proper rule.

2. Petitioner argues (Br. 20–26) that the decision in *Almeida-Sanchez* should be given retrospective effect even if it did announce a new rule. But this

Court has consistently held that new applications of the evidentiary exclusionary rule should be given prospective effect only. *Linkletter* v. *Walker, supra*; *Desist* v. *United States, supra*; *Fuller* v. *Alaska,* 393 U.S. 80; *Williams* v. *United States,* 401 U.S. 646. The "prime purpose" of the exclusionary rule "is to deter *future* unlawful police conduct" (*United States* v. *Calandra,* 414 U.S. 338, 347; emphasis added), and "this purpose would [not] be advanced by making the rule retrospective" (*Linkletter* v. *Walker, supra,* 381 U.S. at 637).

Petitioner argues that *Almeida-Sanchez* "is unlike other Fourth Amendment decisions in recent years since it did not amplify the evidentiary exclusionary rule, but affirmed existing standards that the Government had attempted to avoid" (Br. 22). But that is simply another way of arguing that *Almeida-Sanchez* presents no choice between retroactivity and nonretroactivity. Moreover, while the majority of this Court in *Almeida-Sanchez* may have rested its decision upon established Fourth Amendment principles, the decision, as we have shown, was a novel application of those principles that departed abruptly from the manner in which the courts of appeals, Congress, and the Executive Branch had been applying the same principles in similar circumstances.

Petitioner also contends (Br. 23–24) that the Border Patrol's reliance on prior statutory and decisional authority was unjustified. As the court of appeals

aptly stated, however, "[i]f the border patrol agents cannot rely upon a statute supported by clear regulations which have repeatedly been upheld by a Court of Appeals with no Supreme Court disapproval,[9] it is difficult to conceive what degree of official pronouncements would be necessary to make their reliance justified" (A. 106).

3. Finally, petitioner contends that "[i]t would be a terrible injustice to deny [him] the protections enunciated in *Almeida-Sanchez,*" since he "contested the constitutionality of the search" "[a]t each and every stage of the proceedings," and his case was pending on direct review when *Almeida-Sanchez* was decided (Br. 17). But the same contention was considered and rejected by the Court in *Stovall* v. *Denno*, *supra*, 388 U.S. at 301:

> Inequity arguably results from according the benefit of a new rule to the parties in the case in which it is announced but not to other litigants similarly situated in the trial or appellate process who have raised the same issue. But we regard the fact that the parties involved are chance beneficiaries as an insignificant cost for adherence to sound principles of decision-making.

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[9] The court of appeals' decisions upholding the constitutionality of 8 U.S.C. 1357(a)(3) and the reasonableness of stops and limited searches of vehicles for aliens conducted pursuant to the authority conferred by the statute are collected in our brief in *Peltier*, p. 16, n. 11. This Court, prior to *Almeida-Sanchez*, denied certiorari in at least two of those cases. *United States* v. *Avey*, 428 F. 2d 1159 (C.A. 9), certiorari denied, 400 U.S. 903; *United States* v. *McCormick*, 468 F. 2d 68 (C.A. 10), certiorari denied, 410 U.S. 927.

The Court in *Stovall* thus refused to apply retroactively the constitutional rule established in *United States* v. *Wade*, 388 U.S. 218, and *Gilbert* v. *California*, 388 U.S. 263. It held that, "for these purposes, no distinction is justified between convictions now final * * * and convictions at various stages of trial and direct review" (388 U.S. at 300).

Although some Justices have continued to express the view that litigants whose cases were pending on direct review at the time a new rule was announced should, like the moving parties in the principal cases, enjoy the benefit of the new rule,[10] the Court has repeatedly adhered to its reasoning in *Stovall*. In *Desist* v. *United States*, *supra*, in which the Court held that *Katz* v. *United States*, 389 U.S. 347, should be applied only prospectively, the majority again declined to carve out an exception for cases pending on direct review. "All of the reasons for making *Katz* retroactive [*sic*][11] also undercut any distinction between final convictions and those still pending on review. Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date." 394 U.S. at 253.

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[10] See *Desist* v. *United States*, *supra*, 394 U.S. at 258–259 (Mr. Justice Harlan, dissenting); *Williams* v. *United States*, *supra*, 401 U.S. at 665–666 (opinion of Mr. Justice Marshall); *Mackey* v. *United States*, 401 U.S. 667, 677–681 (opinion of Mr. Justice Harlan).

[11] The word apparently should be "non-retroactive" rather than "retroactive."

See also *DeStefano* v. *Woods*, 392 U.S. 631, 635, n. 2; *Williams* v. *United States*, 401 U.S. 646, 656–659 (plurality opinion); *Adams* v. *Illinois*, 405 U.S. 278, 285 (plurality opinion); *Michigan* v. *Payne*, 412 U.S. 47, 57, n. 15.

Petitioner presents no new considerations that would justify a different result in this case.[12] When, as in the present situation, a decision invalidates under the Fourth Amendment a law enforcement practice that had previously been upheld, the prevailing Fourth Amendment law at the time the officer acted should determine the applicability of the exclusionary rule in each case, and it should not matter whether or not the case was pending on direct review when the new rule was announced. It is the date of the law enforcement conduct, not the date on which the conviction became final, that is the relevant inquiry.

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[12] The Tenth Circuit applied *Almeida-Sanchez* retroactively to checkpoint search cases that were pending on direct review at the time of this Court's decision. *United States* v. *King*, 485 F. 2d 353; *United States* v. *Maddox*, 485 F. 2d 361. The court reasoned in those cases that the defendants should "be given the same relief as has been afforded in *Almeida-Sanchez*," because, like Almeida-Sanchez, they "challenged on constitutional grounds the validity of the statute and regulation throughout the trial court proceedings and * * * pursued [their] challenge in this court as well" (485 F. 2d at 359; see also 485 F. 2d at 363). That reasoning ignores this Court's decisions in *Stovall* and subsequent cases. We submit that *King* and *Maddox* were wrongly decided.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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